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No. 95-2031

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS YOUNG, ET AL., APPELLANTS

v.

KIRK FORDICE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Mississippi is violating Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, by administering a registration system that reflects changes resulting from the manner in which it has chosen to implement the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, when those changes have not been precleared.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
The questions presented are substantial	12
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969)	13, 17
Association of Community Orgs. for Reform Now (ACORN) v. *Edgar*, 56 F.3d 791 (7th Cir. 1995)	3
City of Lockhart v. *United States*, 460 U.S. 125 (1983)	13, 15, 18
Clark v. *Roemer*, 500 U.S. 646 (1991)	12, 13, 16
DuPree v. *Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993), vacated and remanded for clarification, 115 S. Ct. 1684, clarified, No. 490-0043(2) (S.D. Miss. Dec. 29, 1995), aff'd, 64 U.S.L.W. 3815, 3820 (U.S. June 10, 1996)	15
Jordan v. *Winter*, 604 F. Supp. 807 (N.D. Miss.), summarily aff'd *sub nom. Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984)	2
McCain v. *Lybrand*, 465 U.S. 236 (1984)	12, 15, 16
McDaniel v. *Sanchez*, 452 U.S. 130 (1981)	19
Mississippi State Chapter, Operation PUSH v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991)	4, 16, 17
NAACP v. *Hampton County Election Comm'n*, 470 U.S. 166 (1985)	5, 13, 20
Orr v. *Edgar*, No. 95-CO-0246 (Ill. Cir. Ct. May 1, 1996)	4
Perkins v. *Matthews*, 400 U.S. 379 (1971)	13, 18

Cases—Continued: Page

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 3
United States v. *Mississippi*, 380 U.S. 128 (1965) ... 3
Voting Rights Coalition v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 116 S. Ct. 815 (1996) ... 3

Statutes, regulations and rule:

National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.* 2
42 U.S.C. 1973gg 3
42 U.S.C. 1973gg note 3
42 U.S.C. 1973gg-2(a) 3
42 U.S.C. 1973gg-3 3
42 U.S.C. 1973gg-3(c)(2)(B) 3
42 U.S.C. 1973gg-4 3
42 U.S.C. 1973gg-5 5
42 U.S.C. 1973gg-5(a)(2)(B) (§ 7(a)(2)(B)) 9
42 U.S.C. 1973gg-6 3
42 U.S.C. 1973gg-7(b)(1) 3
42 U.S.C. 1973gg-9(d)(1) 20
42 U.S.C. 1973gg-9(d)(2) 20
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* 2
§ 2, 42 U.S.C. 1973 ..... 4, 16
§ 5, 42 U.S.C. 1973c 2, 5, 7, 9, 11, 12, 13, 19, 20
Miss. Code Ann.:
§ 23-15-11 (1990) 5, 13
§§ 23-15-31 to 23-15-45 (1990 & Supp. 1995) 13
28 C.F.R.:
Pt. 51 7
Section 51.22 10
Section 51.37 7
App. 12
Fed. R. Civ. P. 58 11

Miscellaneous:

H.R. Rep. No. 9, 103d Cong., 1st Sess. (1993) 3-4, 20

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-9a) is unreported.

JURISDICTION

The three-judge district court entered its final judgment on February 9, 1996. J.S. App. 10a-11a. Appellants filed their notice of appeal on April 8, 1996. J.S. App. 12a-14a. On May 30, 1996, Justice Scalia extended appellants' time to file a jurisdictional statement until June 17, 1996, and appellants filed their jurisdictional statement on June 17. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATEMENT

This case involves Mississippi's decision to implement the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*, by applying that statute's procedures to registration for federal elections, but not to registration for state and local elections. The NVRA does not supplant the requirements of the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* Under Section 5 of that Act, 42 U.S.C. 1973c (Section 5), voting changes in covered jurisdictions, including Mississippi, must be precleared by the Attorney General of the United States or by the United States District Court for the District of Columbia. The manner in which Mississippi proposed to implement the NVRA constituted a voting change that was subject to Section 5. As a result of the district court's decision in this case, however, Mississippi is now administering a registration system that has never been precleared. The question presented is whether Mississippi's administration of that system violates Section 5.

1. Mississippi has a long history of imposing discriminatory and burdensome registration requirements that have impeded minority citizens' exercise of the right to vote. See, *e.g.*, *United States* v. *Mississippi*, 380 U.S. 128, 131-133 (1965); *Jordan* v. *Winter*, 604 F. Supp. 807, 811-812 (N.D. Miss.) (three-judge court), summarily aff'd *sub nom. Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984). Mississippi was one of the jurisdictions originally subject to the provisions of the Voting Rights Act that require every change in voting procedures to be precleared by the United States District Court for the District of Columbia or by

the United States Attorney General. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 329 (1966).

2. The National Voter Registration Act became effective in Mississippi on January 1, 1995. See 42 U.S.C. 1973gg note. The NVRA requires States to implement procedures designed to make registration less burdensome on voters and to remove opportunities for discrimination in the registration process. See generally 42 U.S.C. 1973gg (findings and purposes). The NVRA requires States to (1) treat every driver's license application as an application for voter registration, see 42 U.S.C. 1973gg-3; (2) accept applications for voter registration by mail, see 42 U.S.C. 1973gg-4; and (3) distribute voter registration applications with each application for services at various state agencies, including all public assistance and disability agencies as well as other agencies designated by the State, see 42 U.S.C. 1973gg-5. The NVRA also regulates the content of voter registration forms, see 42 U.S.C. 1973gg-3(c)(2)(B); 42 U.S.C. 1973gg-7(b)(1), and limits purges of voting rolls, see 42 U.S.C. 1973gg-6.[1]

The NVRA's requirements apply to elections for federal office. See, *e.g.*, 42 U.S.C. 1973gg-2(a) (Act requires States to "establish procedures to register to vote in elections for Federal office"). The statute allows each State to decide whether or not to apply the NVRA procedures to registration for state and local offices as well. See, *e.g.*, H.R. Rep. No. 9, 103d

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[1] The lower courts have upheld the NVRA against constitutional challenge. See, *e.g.*, *Voting Rights Coalition* v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 116 S. Ct. 815 (1996); *Association of Community Orgs. for Reform Now (ACORN)* v. *Edgar*, 56 F.3d 791 (7th Cir. 1995).

Cong., 1st Sess. 21 (1993) ("While this Act applies only to Federal elections and States are free to apply other regulations to State elections, many States will prefer to have the same requirements for both Federal and State elections."). Except for Illinois and Mississippi, every State that has implemented the NVRA has allowed NVRA registrants to vote in all elections.[2]

3. In *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991) (*PUSH*), the district court found that Mississippi had violated Section 2 of the Voting Rights Act by maintaining a system that required voters to register for state elections in a separate procedure from the one in which they registered for local elections. Between 1987 (the date of the district court decision in *PUSH*) and the effective date of the NVRA, "Mississippi maintained a unitary system of voter registration: once a voter was registered properly for any election, he was registered effectively for all elections—local, state, and federal." J.S. App. 7a. State law provided that every inhabitant who met certain age and residency qualifications, who had not been convicted of specified crimes, "and who shall have been duly registered as an elector by an officer of this state under the laws thereof * * * shall be a qualified elector in and for the county, municipality and voting precinct of his

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[2] Illinois's executive branch initially decided to implement the NVRA for federal elections only. That system was recently invalidated on state law grounds, and the State has been enjoined to enroll all NVRA registrants for state and local, as well as federal, elections. See *Orr* v. *Edgar*, No. 95-CO-0246 (Ill. Cir. Ct. May 1, 1996). The injunction has been stayed pending appeal to the Illinois Supreme Court.

residence, and shall be entitled to vote *at any election*." Miss. Code Ann. § 23-15-11 (1990) (emphasis added).

On the NVRA's effective date, Mississippi's existing registration procedures were inconsistent with the federal statute in several respects. See U.S. Mot. for Summ. J. Attach. D6. Accordingly, the State was required to make several changes in its practices in order to conform them to the federal statute. See generally *ibid.* Those changes were subject to preclearance under Section 5. On December 5, 1994, the Attorney General of the United States formally asked the State to submit for preclearance any changes prompted by implementation of the NVRA. Attach. C.

4. On December 20, 1994, the State submitted to the Attorney General for preclearance a package of NVRA-related voting changes. Attach. D1. In its letter of submission, the State sought preclearance for an implementation manual (dated November, 1994) prepared by the Secretary of State's office. *Ibid.* According to the State's letter, that manual constituted "Mississippi's plan to administratively implement NVRA." *Ibid.*[3] The State also transmitted an earlier implementation manual (dated July, 1994), a publication describing NVRA registration procedures at state agencies, a set of new voter registration forms, information on training provided to state and local election officials, and a copy of draft legislation to conform state law to the NVRA. Attachs. D7-D13. A sentence in a table in a July, 1994, compliance report included in the materials provided to the

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[3] Section 5 applies to administrative changes as well as legislative changes in election law. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 176-177 & n.22 (1985).

Attorney General stated that the proposed legislation would "[m]ake NVRA provisions applicable to state and local elections to avoid a dual registration system." Attach. D15. Mississippi's submission letter did not state or suggest in any way that the State intended to utilize the NVRA procedures for federal elections only. Nor did any of the accompanying materials so state. Instead, both the State's "plan to administratively implement NVRA" and the other submitted materials affirmatively indicated that all voters enrolled pursuant to the federal statute, like all voters enrolled under Mississippi's existing registration system, would be registered for both state and federal elections.[4]

From January 1, 1995, until February 10, 1995, some Mississippi election officials enrolled NVRA registrants for both state and federal elections. J.S.

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[4] For example, the manual stated that Mississippi's prior mail-in registration form "ha[d] been redesigned" to conform with NVRA requirements. U.S. Mot. for Summ. J. Attach. D6, at 2. The revised form, included in the submission, bore the title of "Mississippi Voter Registration Application." Attach. D8. It stated, "[i]f you are not registered to vote where you now live, you can use this form to register to vote or report that your name or address has changed." *Ibid.* Similarly, the submission included a new form to be used in voter registration at driver's license offices; that form stated, "[u]nder the new Motor-Voter Law, you may now make application to register to vote in Mississippi (or update your existing Mississippi voter registration) on the same form used for your Driver Services-related application." Attach. D11, at 2. The administrative manual also stated that the "NVRA requires election commissioners to follow specific procedures to purge voter registration lists" and that "[c]urrent methods" of purging "will change" in light of the statute's requirements. Attach. D6, at 4.

App. 3a-4a. Those officials did so in accordance with the instructions of Mississippi's Secretary of State, who had held training seminars for local election officials and state agency personnel in 1994. *Ibid.* At those seminars, the Secretary of State advised the officials "that citizens registering pursuant to the NVRA would be eligible for both federal and state elections." *Id.* at 3a.

On January 25, 1995, the proposed legislation designed to reconcile state law with the NVRA was tabled in the Mississippi legislature. J.S. App. 3a. The tabling of the proposed legislation created two types of uncertainty: (1) whether the State would continue to implement the NVRA on a unitary basis; and (2) if the State intended to continue its unitary system, how, as a matter of state law, it could do so. At the time the Attorney General precleared the State's submission of its administrative plan, Department of Justice officials were aware of, but had not insisted that the State resolve, those uncertainties.[5] Nor did the State withdraw its submission until the uncertainties were resolved or inform the Department that registration under the NVRA would be valid for federal elections only. The Attorney General precleared the State's submission on February 1, 1995. *Id.* at 15a-19a.

5. On February 10, 1995, Mississippi's Secretary of State and its Attorney General jointly issued a memorandum to election officials stating that

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[5] The procedures for the administration of Section 5, 28 C.F.R. Part 51, allow that Attorney General to "request from the submitting authority any omitted information considered necessary for the evaluation of the submission." 28 C.F.R. 51.37.

> [v]oters who register under NVRA are presently not authorized to vote in state elections. Accordingly, circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must "flag" voters registered under NVRA on the voter registration books and pollbooks to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections.

J.S. App. 22a. Voters who had registered under NVRA procedures prior to February 10, and who had been placed on the rolls for all elections, were removed from the list of individuals eligible to vote in state and local elections. *Id.* at 4a.

6. Six days after the February 10 memorandum, the Department of Justice formally requested that the State submit for preclearance its decision to treat NVRA registrants as eligible to vote in federal elections only. J.S. App. 24a-25a. The Department's letter observed that "while, on February 1, 1995, the Attorney General granted Section 5 preclearance to procedures instituted by the state to implement the NVRA, that submission did not seek preclearance for a dual registration and purge system and, indeed, we understand that the decision to institute such a system was not made until after February 1." *Ibid.* When Mississippi refused to make such a submission, the United States brought an action to enforce the preclearance requirement. On April 20, 1995, the United States filed a complaint in the United States District Court for the Southern District of Mississippi. The complaint alleged that the State had violated Section 5 by adopting a dual system of voter

registration without first obtaining preclearance. Compl. ¶¶ 16-43. The complaint also alleged that Mississippi was violating Section 7(a)(2)(B) of the NVRA, 42 U.S.C. 1973gg-5(a)(2)(B), by failing to afford voter registration at "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities." See Compl. ¶¶ 44-50.

On the same day, appellants brought the instant action, which alleged similar violations of Section 5 and the NVRA, and which sought similar relief. The two cases were consolidated (J.S. App. 5a), and a three-judge district court was convened to hear the Section 5 claim. See 42 U.S.C. 1973c. The parties filed cross-motions for summary judgment on that claim. The United States moved for a preliminary injunction, requesting that the State and its officials

> be preliminarily enjoined from implementing unprecleared changes to the voter registration and purge procedures set forth in the State of Mississippi's administrative plan for implementing the [NVRA], which received preclearance on February 1, 1995, and which provides that NVRA registrants are eligible to vote in all elections conducted in the State and that NVRA purge procedures govern eligibility to vote in all elections conducted in the State. The changes that are being implemented without the requisite Section 5 preclearance include the decision to limit NVRA registrants to voting in federal elections only, the decision to apply NVRA purging procedures to federal elections only, and the procedures adopted to implement these decisions.

U.S. Mot. for Prelim. Injun. at 1-2.

7. On July 24, 1995, the three-judge court issued an order granting the State's motion for summary judgment on the Section 5 claim and rejecting the plaintiffs' motions for summary judgment on that claim. J.S. App. 1a-9a. The court concluded that, under Mississippi law, only the legislature could decide to apply the NVRA's procedures to registration for state and local elections. *Id.* at 7a-8a. Because the State had never enacted proposed legislation to accomplish that end, the court believed that the Secretary of State's administrative authority to implement the NVRA extended to federal elections only. *Ibid.*[6] In the three-judge court's view, the State's submission was limited to those aspects of implementation that the Secretary of State could accomplish administratively—those involving the implementation of the NVRA for federal elections—and those aspects "ha[d] been precleared" on February 1. *Ibid.*

Although some election officials had implemented the NVRA on a unitary basis from January 1 to February 10, the three-judge court did not believe that the February 10 memorandum advising them to cease that practice constituted a voting change. It held that "the state may correct a misapplication of

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[6] Although the State's submission included a copy of the proposed legislation to apply the NVRA to state and local elections, the district court correctly held (see J.S. App. 7a-8a) that the unenacted law was not a part of the submission considered by the Attorney General. See 28 C.F.R. 51.22 (Attorney General will not consider on merits any proposed change "submitted prior to final enactment or administrative decision"). Mississippi's submission did not state that failure to enact that legislation would make NVRA registration valid for federal elections only.

its own laws, which by its conduct it has not ratified, without obtaining preclearance." J.S. App. 8a. The three-judge court found "no evidence of ratification," observing that "there is no evidence that the governor or the legislature or the Mississippi Attorney General condoned the month long practice on the part of some election officials to qualify voters contrary to applicable state law." *Ibid.*

Finally, the court stated that "the fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance." J.S. App. 8a. Because the obligation to apply NVRA procedures to federal elections is imposed by federal law, the court asserted,

> it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance * * *.

Id. at 8a-9a.

The three-judge court accordingly ruled for the State on the Section 5 claims. After a voluntary resolution of the NVRA claims, the court entered a final judgment pursuant to Fed. R. Civ. P. 58 on February 9, 1996. J.S. App. 10a-11a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

On the date the NVRA became effective in Mississippi, the State maintained a unitary system of registration, in which a single registration made a voter eligible to vote in federal, state, and local elections. Since February of 1995, however, Mississippi has implemented a new dual registration system under which voters registered under the NVRA procedures will be permitted to vote only in federal elections, while those registered through the State's other registration procedures will be eligible to vote in all elections.

Mississippi's implementation of a new method of registration that authorizes voting only in federal elections creates the likelihood of voter confusion and may have a racially discriminatory impact. A similar dual registration system in Mississippi was struck down less than ten years ago as discriminatory in purpose and effect. Such a new procedure cannot be implemented until and unless it is precleared as required by Section 5 of the Voting Rights Act. The limited, federal-election-only nature of Mississippi's proposed NVRA registration, however, has never been precleared by either the Attorney General or the District Court for the District of Columbia. The district court was therefore required to enjoin its implementation until preclearance is obtained. *Clark* v. *Roemer*, 500 U.S. 646 (1991); *McCain* v. *Lybrand*, 465 U.S. 236 (1984). This Court should note probable jurisdiction in order to prevent the implementation of this important, unprecleared voting change.

1. Mississippi is a "covered jurisdiction" under Section 5 of the Voting Rights Act. See 28 C.F.R. Pt. 51, App. A covered jurisdiction may not enforce a

change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from the Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. 1973c; *Clark*, 500 U.S. at 652. If the jurisdiction seeks to enforce a change before preclearance is obtained, the United States or private plaintiffs "are entitled to an injunction prohibiting the State from implementing the changes." *Id.* at 653.

A suit to enjoin the implementation of an unprecleared voting change is heard by a three-judge district court and may be brought in the district in which the change is implemented. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 557-563 (1969). In such an action, the local district court does not consider whether the change is discriminatory in purpose or effect; that substantive question is reserved for the Attorney General or the District Court for the District of Columbia. The local district court may consider only whether the change is subject to Section 5 and whether it has been precleared. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *Perkins* v. *Matthews*, 400 U.S. 379, 383-386 (1971).

2. For several years prior to the effective date of the NVRA, Mississippi permitted every registrant to vote in all elections. See Miss. Code Ann. § 23-15-11 (1990). Voter registration took place under procedures prescribed by Miss. Code Ann. §§ 23-15-31 to 23-15-45 (1990 & Supp. 1995). When the NVRA was enacted, mandating that additional procedures be made available for registering to vote in federal elections, the State was faced with a decision. It could

continue its existing practice of enrolling all registrants for state and local, as well as federal, elections by applying the new NVRA procedures to all elections, or it could limit NVRA registration to federal elections, thus requiring an NVRA registrant wishing to vote in state and local elections to register under the State's non-NVRA registration procedures.

The materials submitted to the Attorney General for preclearance by the State in December, 1994, gave no indication that voters enrolled pursuant to the NVRA would be registered for only federal elections. See pages 5-6 & note 4, *supra*. Indeed, the Secretary of State (the chief state election official) initially instructed subordinate officials to implement NVRA registration on a unitary basis—*i.e.*, as applicable to state and local, as well as federal, elections—and some of those officials followed that instruction. See pages 6-7, *supra*. A post-preclearance February 10 memorandum issued by the Mississippi Secretary of State and Attorney General stated that NVRA registration would not apply to state and local elections. But at the time of preclearance (February 1, 1995) neither the preclearance submission itself, nor the actions of state officials, suggested that Mississippi intended to restrict its implementation of the NVRA to federal elections only. To the contrary, both the submission and the officials' actions indicated that NVRA registration would apply to all elections.

The failure to enact proposed state legislation reconciling state registration procedures with the NVRA created uncertainty regarding the eligibility of NVRA registrants to vote in state elections. That legislation was tabled on January 25, 1995, approximately one month after the preclearance submission

was made, and seven days before preclearance was granted. See page 7, *supra*. Mississippi never informed the Attorney General that the failure to enact the proposed legislation would require it to change its existing practice of unitary registration and implement the NVRA for only federal elections. At the time of preclearance, both Department of Justice officials and State officials were nevertheless aware of the legislature's failure to act and of the uncertainties it created. The Attorney General did not resolve the uncertainties before issuing her preclearance decision. That failure, however, does not relieve the State of the burden to "identify with specificity each change that it wishes the Attorney General to consider." *Clark*, 500 U.S. at 658. "Any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Id.* at 656; *McCain*, 465 U.S. at 251; *DuPree* v. *Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993), vacated and remanded for clarification, 115 S. Ct. 1684, clarified, No. 490-0043(2) (S.D. Miss. Dec. 29, 1995), aff'd, 64 U.S.L.W 3815, 3820 (U.S. June 10, 1996).[7]

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[7] As this Court has explained, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." *Clark*, 500 U.S. at 658. The Attorney General is required to make a variety of complex factual determinations during the 60-day preclearance period and is not able, as a practical matter, also to "monitor and identify each voting change in each jurisdiction subject to § 5." *Ibid.* Nor is the Attorney General expected to be an expert in state law. See *City of Lockhart*, 460 U.S. at 133 n.8 ("We also believe that the Attorney General and the District Court for the District of Columbia should be free to decide preclearance questions on the essentially factual issues of discriminatory purpose and effect. We doubt that Congress intended to force either into speculation as to the

To construe Mississippi's preclearance submission in this case as proposing a change to a dual registration system would be particularly unwarranted, since such a system raises special Voting Rights Act concerns. The State had adopted its unitary system only after a federal court invalidated an earlier dual system, in which persons were required to register separately for state and local elections. *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991) (*PUSH*). In holding that that dual system violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the *PUSH* court concluded that the practice had been adopted with a racially discriminatory purpose and that it continued to produce discriminatory results. See 674 F. Supp. at 1252-1261. The court explained that the dual system made registration more cumbersome generally, and that disparities between black and white Mississippians in income and education caused blacks to be disproportionately affected by the cumbersomeness. *Id.* at 1255-1256. The court observed that "[m]ore black citizens than white have been denied the right to vote in municipal elections, because their names could not be found on municipal voter registration rolls, and this has

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state law."). If States were not required to advise the Attorney General specifically of each change worked by a submission, "it would add to the Attorney General's already redoubtable obligations," "diminish covered jurisdictions' responsibilities for self-monitoring," and create an incentive for States to make their submissions as broad and ambiguous as possible. *Clark*, 500 U.S. at 658-659; accord *McCain*, 465 U.S. at 257.

probably resulted in the defeat of black candidates." *Id.* at 1255.[8]

On February 1, 1995, when the Attorney General precleared the State's submission, the State had begun implementing the NVRA on a unitary basis. In addition, the submitted materials appeared to indicate that persons registered under the NVRA would be permitted to vote in all elections. The submission did not, in all events, make clear that NVRA registrants would be eligible to vote only in federal elections. The submission therefore did not "unambiguous[ly]" seek preclearance for a decision to implement the NVRA on a dual basis—a change from the basis for all other Mississippi voting registration at that time. See *Allen* v. *State Board of Elects.*, 393 U.S. 544, 571 (1969). Mississippi was free subsequently to decide to make NVRA registrants, unlike all other Mississippi voting registrants, eligible to vote in federal elections only. But implementation of that decision would

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[8] Black voters may thus be worse off under a dual registration system than they were before the enactment of the NVRA. Under the State's federal-election-only NVRA system, NVRA registrants must be placed on separate voter lists, which will likely increase voter confusion at the polls. That situation could lead to an increased rate of election day challenges, which may affect black voters most heavily. Cf. *PUSH*, 674 F. Supp. at 1255. In addition, voters who register under the NVRA procedures may decide not to register for state elections in the mistaken belief that NVRA registration is effective for all elections.

The discriminatory effect of those harms depends in part on how the State plans to inform NVRA registrants that they are eligible to vote in federal elections only. Those plans would be contained in the procedures the State submits for preclearance. Mississippi, however, has never submitted for preclearance procedures to implement a federal-election-only NVRA system.

constitute a change that could not be implemented without preclearance.

3. At the crux of the district court's reasoning was its conclusion that "the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General." J.S. App. 8a. Because Mississippi's initial decision to apply NVRA procedures to state elections was contrary to state law, the three-judge court held, Mississippi was free to change that decision—even after it had been precleared by the Attorney General—without obtaining a further preclearance for the change. That holding misapprehends applicable precedent. A State is required to obtain preclearance for a change from "the procedure *in fact* 'in force or effect,'" *Perkins*, 400 U.S. at 395, whether or not that procedure is consistent with applicable state statutes. See *City of Lockhart*, 460 U.S. at 133 ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect."). Once Mississippi had *in fact* implemented its practice of permitting NVRA registrants to vote in state elections through the actions of its chief state election official (the Secretary of State) and subordinate officials, a subsequent change in that practice was required to be submitted for preclearance.

4. In refusing to enjoin the State's dual system, the three-judge court also asserted that "it is the federal government that has created this system of dual registration, not the State of Mississippi." J.S. App. 8a. In the court's view, that conclusion followed from the fact that "[t]he NVRA records are maintained at the instance of the federal government and

pursuant to federal law." *Ibid.* The court concluded that "[t]he State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a non-discretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General." *Id.* at 8a-9a.

That analysis is incorrect. "[W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable." *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981). The NVRA requires States to use certain procedures in registering voters for federal elections. But federal law permits a State to apply the Act's procedures in state and local elections as well. Mississippi's decision not to do so was a discretionary state policy choice, not the product of federal compulsion.[9] If Mississippi submits a federal-election-only NVRA plan for preclearance, the preclearance process must determine whether Mississippi has met its burden of showing that that plan, as implemented by the submitted forms and procedures, was not motivated by a discriminatory purpose, and will not have a discriminatory effect.

Mississippi was required to obtain preclearance before implementing the NVRA, for the NVRA, by its terms, does not "supersede, restrict, or limit the

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[9] Mississippi stands alone among jurisdictions covered by Section 5 in deciding to implement the NVRA for federal elections only.

application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1). See also 42 U.S.C. 1973gg-9(d)(2) ("[n]othing" in the NVRA "authorizes or requires conduct that is prohibited by" the Voting Rights Act). Congress in fact rejected a proposed amendment that would have exempted NVRA implementation from Section 5's preclearance requirement. See H.R. Rep. No. 9, 103d Cong., 1st Sess. 37 (1993) (minority report). Where a State decides to implement the NVRA by changing its practice of enrolling all registrants for all elections, that decision, and the procedures through which it will be implemented, have a "potential for discrimination" and must be submitted for preclearance. See *Hampton County Election Comm'n*, 470 U.S. at 181 (emphasis omitted).[10]

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[10] Section 5 of the Voting Rights Act does not compel all States to implement the NVRA in the same way. It does, however, require that a State's choices be proven to be nondiscriminatory before they are implemented.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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